Quid Novi

VOL. II NO. 21 McGILL UNIVERSITY FACULTY OF LAW MARCH 4, 1982

L.U.S. aids Regalado

BY JOSEPH RIKHOF

Victor Manuel Regalado Brito, age 33, is a journalist from El Salvador, and a member of the Democratic Nationalist Union (U.D.N.), one of the parties within the Democratic Revolutionary Front (F.D.R.) of El Salvador.

In February 1980, Mr. Regalado came to Canada on a church-sponsored speaking tour. In Montreal and other cities, he was active in promoting support for Archbishop Romero's hospital and the press in El Salvador.

Mr. Regalado requested the Immigration Department to transfer his status to that of refugee. In August 1980, before the Department had acted on his application, Mr. Regalado left Canada to attend a journalists' conference in Nicaragua. He then went to live in Mexico.

In May 1981, the Canadian Immigration Department announced a special policy for persons from El Salvador. In particular, no Salvadorean who reached the Canadian border was to be deported to El Salvador during the civil war. At the end of December 1981, Mr. Regalado left Mexico, travelled across the U.S. without being stopped by American officials, and presented himself at the Canadian border south of Montreal on January 5, 1982.

Victor Regalado applied at the Canadian border for admission as a refugee under the Canadian Immigration Act and the Geneva Convention on protection of refugees. Section 23(4) of the Immigration Act permits immigration officers to return "a person who is residing or sojourning" in the U.S. to that country until an adjudicator can be brought to the border to preside at the inquiry. Although Mr. Regalado was not residing or sojourning in the U.S., Canadian officials employed s. 23(4) to return him to the U.S. to await the arrival of an adjudicator.

Mr. Regalado was arrested by American authorities and detained in Plattsburgh. Documents were signed to effect his transfer to Buffalo, where he would have been the subject of a hearing resulting in his deportation to El Salvador.

On January 7, in response to interventions by lawyers in Montreal and Toronto, Mr. Regalado was instead sent back to the Canadian

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Fight must continue

Anderson tells women

BY FRAN BOYLE

The women's movement still has an important social and political function to perform. In a lecture on February 18, Doris Anderson made this point clear. But, while she could readily demonstrate the need for some type of action, the particular form it must take was never defined.

Ms. Anderson is the former president of the Canadian Advisory Council on the Status of Women who resigned that post last year in a blaze of publicity and allegations of unwarranted ministerial interference. Her talk, nominally on the topic of "Women and the Constitution", was sponsored jointly by the McGill Women's Union and the Program Board.

The constitutional issue was buried in a very general discussion of the perceived and real changes in women's roles and status over the past decade. Ms. Anderson was largely preaching to the converted. Her talk appeared to be adapted only slightly from one she might give to an audience of Chatelaine readers like those whose letters went from the "why turn a nice family magazine into a feminist rag?" variety in the early seventies to a gradual awareness later in the decade expressed as "I'm not a women's-libber, but..."

This first portion of Ms. Anderson's talk consisted of a familiar recitation of areas where women's social circumstances have improved. Her admonition that the changes to date are merely incremental was hardly news. Solutions framed in terms of altering attitudes and increasing the number of women in government and on the courts contained no suggestions for practical implementation.

Despite the lack of definition in this area, Ms. Anderson's account of the events leading up to her resignation from the Advisory Council last January illustrate that the government's unawareness and insensitivity to women's problems is manifest.

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Regalado

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border, where immigration officials this time arrested him. Mr. Regalado was incarcerated in Parthenais Detention Centre in Montreal, where he remains today.

Mr. Regalado's problems stem from a secret R.C.M.P. security report which purportedly has been forwarded by Solicitor General Kaplan to Minister of Immigration Axworthy. Employing s. 39 of the Immigration Act, Messrs. Axworthy and Kaplan have signed a security certificate naming Victor Regalado as a person "who there are reasonable grounds to believe will engage in or instigate the subversion by force of any government." Under s. 19(1)(f) of the Act, such persons are inadmissible.

The extraordinary feature of a s. 39 certificate is that it permits the Minister and Solicitor General to perform a function ordinarily reserved for a judicial or quasi-judicial body. Based on secret information and allegations, the government has determined that Mr. Regalado fits within the inadmissible category described in s. 19(1)(f). Mr. Regalado has never had an oportunity to learn what the specific information and charges against him are. He can neither correct nor deny them.

On February 17, Immigration Adjudicator Patricia Ellis ordered Mr. Regalado deported. The Minister produced no evidence against Mr. Regalado, and Mr. Regalado's lawyer was not permitted to produce witnesses. Ruled Ellis, "The ministers' certificate is incontestable. Why should we waste time listening to witnesses when none can convince me that the certificate is not true?"

Although Mr. Regalado has been recognized as a Convention refugee since Feb. 5, the Government still intends to implement the deportation order. If the Department proceeds with its original plan of sending Mr. Regalado to the U.S., he quickly will be turned over to the Salvadorean junta. In these circumstances, his life will be forfeit.

On February 11 Mr Axworthy finally was persuaded to offer Mr. Regalado an opportunity to locate a receptive third country. The Minister remains unwilling, however, to guarantee he will not deport the Salvadorean refugee to the U.S. or El Salvador when he feels that opportunity has been spent.

Nor has Mr. Axworthy agreed to allow Mr. Regalado to stay in Canada until his legal recourses are exhausted. Mr. Regalado is now preparing to be heard by the Immigration Appeal Board, but is completely dependent on public pressure to keep him in the country during that hearing.

Deportation even to a third country remains an unacceptable solution to the Salvadorean journalist. Governments everywhere would treat with suspicion and hostility an individual ejected from Canada on the basis of undisclosed intelligence reports. Mr. Regalado has expressed his determination to remain in Canada until he can force the disclosure of the R.C.M.P. dossier and clear his name.

It appears that as long as Mr. Regalado fights for his life and reputation he must remain in prison. Superior Court has declined to grant a writ of habeas corpus, and on February 10 the Quebec Court of Appeal refused to overturn that decision. Justice Montgomery felt himself bound by the s. 39 certificate, despite his finding that Regalado could be trusted to appear at hearings and posed no threat to the Canadian public.

Mr. Regalado's fate has occasioned a wave of astonishment and dismay across the country. Individuals and organisations, including religious groups and leaders, civil libertarians, associations of jurists, and members of Parliament and provincial assemblies have announced their support for his immediate release and authorization to remain in Canada. The Law Faculty may wish to note in particular that the 160 member Association of Defence Lawyers has published its support.

Law students perhaps will feel particularly outraged by this flagrant violation of fundamental human rights. The executive members of McGill's Law Undergraduate Society have pledged $250 on our behalf to the publicity campaign organised for Victor Regalado's defense by the Ligue des droits et libertés (which they have personally guaranteed to cover should the LUS Council subsequently reverse the decision). Plans are under way to seek support for the Regalado petition from other law school societies. At McGill Law School all persons are urged to sign a copy of the petition posted around the school and being circulated in classes tomorrow and on Monday. Students and faculty are also encouraged to send telegrams to Mr. Axworthy in Ottawa, with copies to the local newspapers.

Anderson

(Continued from page 1)

During the federal-provincial negotiations on the constitution, responsivility for family law became a bargaining point. The repercussions of making political concessions in this area, said Ms. Anderson, were potentially disastrous. Handing total responsibility for family law, including divorce, back to the provinces would be a massive step backward. Already-existing difficulties with support and child custody enforcement would be endlessly compounded.

An apparent failure on the part of the politicians to appreciate the sensitive nature of these issues was the initial impetus behind a proposed conference on the constitution to be sponsored by the Advisory Council. The fact that the contents of a 74 page paper prepared by the council were totally disregarded in the initial draft of the Charter of Human Rights made the need for such a conference even more obvious.

According to Ms. Anderson, the request from Lloyd Axworthy, then minister-in-charge of the Advisory Council, that the conference be cancelled was an attempt to avoid "embarrassing" comments arising at the same time as the Charter was being debated in the House of Commons.

Ms. Anderson said she felt her sister council members acceded to the request in gratitude for the incorporation of some council recommendations in the revised draft of the charter. "It was 'be nice to the government' time", she said.

Ms. Anderson's resignation followed. She attributes the success of the reorganized conference to public outrage at Axworthy's move. She characterized the gathering as a productive meeting of 1300 furious women. The well-thought-out recommendations that emerged, and effective lobbying resulted in the inclusion in the Charter of section 28, a statement of equality between men and women its application. Ms. Anderson stated that this was nothing less than remarkable, since the equivalent Equal Rights Amendment has been the focus of struggle in the U.S. since 1928

The handling of sections 15 and 28 in the final round of federal-provincial negotiations following the Supreme Court decision was less encouraging. The addition of the notwithstanding clauses to the sec-

tions diminishes their effectiveness. Ms. Anderson views them as a call for vigilance on the part of interested women to seek out discriminatory laws and have them reviewed.

An instance that Ms. Anderson considered shocking was that Prime Minister Trudeau was unable to respond to a question on the fate of section 28 after the accord was reached.

The last stage of the constitutional wrangling was the lobbying of the provincial premiers until the final hold-outs agreed to the inclusion of a prohibition against sexual discrimination. According to Doris Anderson, this exemplifies the fight that must still be carried on.

She referred to the manner in which the Supreme Court of Canada has consistently "dropped the ball" in trying cases (like Murdoch and Lavell) which dealt with issues of importance to women. The failure of affirmative action to take hold in this country was cited as another area where battle is yet to be waged.

Women now on the verge of entering the work force will be the cutting edge of what is about to happen, said Ms. Anderson. In conclusion, she quoted Simone de Beauvoir's comment of 20 years ago to the effect that the first free woman was only then being born.

Despite the intended inspiration, Ms. Anderson contributed little to what is basically a common awareness of the need for change. The fact that a woman of Doris Anderson's experience in the social and political spheres is capable only of supplying guidance in vague generalizations points out the continuing need to reformulate goals and redefine directions within the women's movement.

It is a truism that the increased number of women in law schools is a necessary ingredient in attaining the required base for change in government, administration and the judiciary.

Earlier in her talk, Ms. Anderson pointed out that there are now 14 women in the House of Commons. At the rate of increase established since Agnes McPhail became the first woman, MP, it will take 424 years before the ratio in Parliament becomes equal.

Unless women are prepared to wait that long for change, a new mechanism for progress must be sought out and set into motion.

Defence spending dwarfs aid to third world, panel says

BY MARTINE TURCOTTE

Last February 18th, the Panel Discussion Series of the McGill International Law Society presented its second symposium on international conflicts entitled "Canada's Economic Role in Conflict Avoidance". Participants in the discussion were Mr. Norman Hicks, from the Development Policy Department of the World Bank, Mr. J.R. Roy, Director of Development Policy Analysis and International Cooperation, C.I.D.A., and Professor West form the Fletcher School of International Law and Diplomacy.

Prof. West discussed the historical aspect and the content of the New International Economic Order adopted in 1974 emphasizing that it is now more concerned with rules governing the international trade. He then explained the work done at the United Nations Conference on Trade and Development (UNCTAD) towards international cooperation.

At the fourth UNCTAD conference in 1974, 2 major items were brought forward: the establishment of a common fund and debt relief for the developing countries. But the emphasis on such priorities shifted away when, at the fifth conference in 1979, the question of how to provide technical assistance to the developing countries was raised.

Although the 1970's brought us an increase in military insecurity and in the internaional arms trade, a period of uncertainty about conditions of energy supplies and a period of economic slowdown, Prof. West concluded on a rather optimistic note saying that "like the sea beneath the snow, the spring of the 80's is to bring to us progress in these areas". But at the same time, he stressed the importance of working towards human welfare and the equitable distribution of wealth.

Mr. Hicks agreed and said that human welfare was one of the priorities of the World Bank. Although the World Bank was founded initially to handle the reconstruction of Europe after the 2nd World War, it then turned to development. In general, the international organization stays away from political problems and focuses on financing regional programs and promoting development. Mr. Hicks concluded that the World Bank does try to work towards a more equitable world but when "governments spend 5 billion on defence and 200 million on aid only, the parity is screwed up".

Mr. Roy, on the other hand, stressed the importance of the North-South Dialogue where the third world is a "negotiating party" and not merely the object of charity. He said that although "the global negotiations to change the international economic relationship are not in the interest of the western countries, it is our duty to go on in the name of equity". He added that "we cannot opt out of the North-South Dialogue. We cannot escape being involved." He said that the orientation of the Canadian International Development Agency (C.I.D.A.) was to promote social justice, to integrate the third world in our society, to improve the planet's global economy, to give aid in order to promote energy production, to increase the actual aid given and to involve the canadian public and industry in order to establish a more stable world. "Stability", he concluded, "will help avoid conflict".

When asked whether the aims of the different programs would not be better served by selective aid to prevent violations of human rights, Mr. Roy replied that there is a danger in attaching conditionality to these programs. Canada sometimes will refuse to lend to oppressive regimes but C.I.D.A. is aimed at helping people and "as long as aid reaches people, it is satisfactory."

The general consensus amongst the panelists seemed to be that the ultimate goal is the equitable distribution of wealth and to arrive at such a point, parties will have to sit down, negotiate and make concessions. And then maybe, the world will be more stable.

Editorial

The rhetoric of economics

Another 1929 is staring North America right in the face. But then, that is only the good news. The best news is that all credible analyses indicate that in Canada, Quebec and Ontario will be the hardest hit.

In dealing with the present economic mess, our Ministry of Finance has demonstrated such a high degree of adeptness that it seems almost as capable with the Canadian economy as a rooster with a Rubik cube.

Canada has essentially adopted a Great White North version of Reaganomics. Unfortunately, Reaganomics is doomed to failure. It is a fundamental contradiction in economic theory. It is a hopeless marriage between two radically incompatible schools, Chicago and California, and it should be annulled immediately.

The California school of supply-side economics, spirited by Prof. Arthur Laffer, seeks to expand the economy by cutting taxes for the rich, allowing government to run a big deficit,and (with any luck) thereby stimulating investment. The Chicago school of avant-garde laissez-faire monetarism, lead by grown-up whiz kid Milton Friedman, advocates tight monetary policies of high interest rates in order to contract the economy, put a hold on investment, and (again, with any luck) control inflation. The contradiction becomes quite obvious: loose fiscal spending with tight monetary restraint--you cannot combine economic expansion with economic contraction.

Canada's answer to Reaganomics is MacEachenomics. It is Reaganomics by proxy. The same rhetoric is there, except that MacEachen is ostensibly combining his murderous monetary policy with fiscal restraint.

The rhetoric behind the high interest rate policy of MacEachen is a fancy phrase that sounds off the battle-cry of "reducing inflation in the long run". In reality, the reason is that Canada traditionally maintains its interest rates above those of the U.S. in order to protect its exchange rate.

The stakes, however, are too great to blindly and stubbornly maintain tradition. What is at stake is depression. Great depression. The economic indices already suggest such a conclusion, and in any event, one will recall that it takes time for the full effect of a great depression to be felt. It was three years after the Crash of 1929 before America hit bottom.

The cost of departing from the Canadian tradition of following U.S. interest rate policy would be at worst a drop in the Canadian dollar. But this would likely be offset by a fall in the U.S. dollar which will occur as soon as their current account balance of payments slides into deficit due to a depressed export economy.

Clearly MacEachen must depart from his dogmatic devotion to Reaganomic monetarism. If not, he will have to justify his monetary mutiny of the Canadian economy. Surely he must be of greater principle than to attach more importance to personal pride and political survival than to the economic survival of the entire country. It would be sad, some day, to see some cynic sum up this moment of history in the following poor excuse for verse. But if no new thinking is quickly seen, someone will surely soon be writing these words:

MacEachenomics they prayed
would triumph,
And halt inflation from its
endless jump;
But the country slipped into
deepest slump
While the Minister sat on his
kilted rump.

DANNY GOGEK

QUID NOVI is published weekly by the students of the Faculty of Law of McGill University. Opinions expressed are those of the author only. Contributions are published at the discretion of the editor and must indicate author or origin.

Staff: Peter Dauphinee, Lynn Bailey, Richard Janda, Martine Turcotte, Ron Lucciola, Gary Littlejohn, Paul Mayer, Celia Rhea, Daniel Gogek, Lesley Cameron, Lise Hendlisz, Kim Rodgers, Pearl Eliadis, Joseph Rikhof, Jeff Reusing, Demetrios Xistris.

Contributors: Kwamogi Anywar.

C.A.D.E.D gets procedural face-lift

BY JOSEPH RIKHOF

The McGill delegation of CADED (La Confédération des Associations des Etudiants en Droit) proposed substantial amendments to the CADED constitution on the February 5th meeting. The McGill delegation had already expressed earlier its dissatisfaction with the CADED structure (see Quid Novi, no. 18, February 4, 1982), and for that reason Campbell Stuart and Marek Nitoslawski decided to submit alterations to improve the situation.

The most important change is the establishment of a new organ, the Plenary, which will replace the Council as the main decision maker. According to the proposed amendment the Plenary will be organised once every half year on a rotational basis by one of the members of CADED. Since the decisions of the Plenary will be binding on CADED, and since the decisions of the Plenary will be taken by a majority vote by the members, who do not have to be representatives of the student associations, the CADED organization has increased its democratic potential. As a result of these changes, students who are not involved in for instance the L.U.S. can participate and vote in the Plenary. This new structure makes it possible for UQAM to participate in CADED, which would be an improvement. Not only the structure but also the content of the decision making process will change. Each Plenary will have a theme, so that not as much time will be lost on procedural matters.

The drafters of this proposal are hoping that because of the better accessibility of CADED for individual students, because of the rotating conference system and the introducing of themes which are of concern to students during that particular period, the involvement and enthusiasm of students will increase.

The reactions at the last CADED meeting were very favourable and the proposal would have been accepted, if the required quorum to change the consitution had been present. Without any doubt, the CADED council will accept the amendment this month.

Co-operation or confrontation?

This article is in response to Dave Toupin's timely reminder ("Student Representation: Have we forgotten so soon?" Q.N., Feb. 18) that our major electoral commitment remains unfulfilled. We certainly have not forgotten. In its last manifestation the issue led to the Day of Silence and some of its organizers were elected to the LUS executive shortly thereafter.

Generally speaking we have considered ourselves handy enough at the politics of cooperation. We have been able to work on "atmosphere", on fostering a constructive and participating approach to the faculty this year despite an institutional context that enforces confrontation. We must work on an institutional structure that will consolidate our gains, for otherwise they will surely be lost. Not because anyone is plotting retaliation, but because building and cooperation feed on quite different food than that served up in Faculty Council.

History illustrates. The Dean and many professors have assured us that the previous two years have been marked by negative, reactive, and confrontational student executives. Before that, there was flat apathy: the students did nothing. This constitutes the oft-cited "cycle" of student sentiment: apathy to anger to apathy again. Nowhere on this cycle does one find the present "constructive" mode. One can blame neither students, nor faculty for this. It is due rather to the dynamics of their interaction. It's a question of process. We have momentarily lifted ourselves out of the cycle and we don't want to drop back into it. The Faculty has been getting something it has never had from students before: genuine, constructive and loyal cooperation on a massive scale.

And it has been getting it on credit. That credit has been extended by an LUS that felt strong enough to risk moving off its traditional base of support and mode of operation, away from the politics of simple issues, of general assemblies, and of "student demands" -- away from the politics of confrontation. To do this we have been fighting a very strong current.

Consider the forces at play in Faculty Council. We are four against thirty. The feeling of isolation is strong. The resulting cohesion is also strong. We are four elected by five hundred. The role model is that of bargaining agent, not of members of a council. We are four individuals. There is an inherent instability in a system that depends on the personalities of so few. We are four students among five hundred. It is hopeless to expect that so few can communicate to the many the realities of compromise, or to assure any sort of continuity of awareness on Faculty Council.

These are the forces that dictate an aggressive and uncooperative participation of students. They dictate a mode of behaviour that can reassert itself any time. Confrontation is easy. Cooperation is hard. Total abdication would be most devastating for all concerned. It could happen. It already has. Now is the time to consider adjusting structures to assure cooperation in the future. Now is the time because LUS elections are coming up and continuity is the question.

What role will the new executive adopt? How will they react? First off, we must realize that the LUS has not employed the tool of confrontation to recruit candidates and "raise consciousness" among students generally. To repeat: the energy of this year's executive came largely from anger over events last year. In chanelling that energy into a cooperative mode, we have built a utopian myth inconsistent with the realities of our institutional design. To this extent we have betrayed our constituents. In a sense this year's electorate and candidates will not be "forewarned and forearmed", as we were, against the institutional prejudice they will labour under in Faculty Council. Will the new executive be able to transcend the systematic faults of Council, or will we be back in the cycle?

The change that must come is in the number of students on Faculty Council. There must be enough to assure continuity. There must be enough to take off the edge of confrontation, enough to show breadth and diversity where before there was a student position. There must be enough to reduce the importance of individuals. There must be enough to demonstrate a true integration of students in Council commensurate with the responsibilities they have undertaken. Most important of all, there must be enough that the individual's loyalty would be to Council, albeit with a student perspective. This is a realistic scenario, based on an understanding of the power of roles in our own profession.

The draft LUS constitution represents an attempt to remedy defects on the issue of continuity of student-run services. At the same time, it is an invitation to Faculty to join in a more flexible and cooperative structure. The key is the LUS Council, whose size would be reduced and whose role would be increased. Newly created reps to Faculty Council would sit on the student council (say four more for a total of eight). The LUS executive would not dominate on Faculty issues. It would also increase the understanding by students of Faculty affairs without putting issues in a populist form, and would permit a natural diversity of opinion among students without breaking continuity.

Now would be a good time for Faculty Council to act. Its time to get off the merry-go-round.

THE LUS EXECUTIVE

South African Justice : The Rule of Flaw

BY KWAMOGI ANYWAR

"It appears in our books, that in many cases the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it , and adjudge such Act to be void."
(Sir Edward Coke, 77 E.R. p. 652. (C.P. 1610))

LEGAL-HISTORICAL BACKGROUND

Coke's dictum could hardly be described as an isolated affirmation of the notion of a higher law with which even Acts of Parliament were to conform. In 1702 Chief Justice Holt stated that: "What Lord Coke says in Dr. Bonham's case... is far from extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge... it would be a void Act of Parliament. (City of London v. Wood, 88 E.R. pp. 1592, 1602 (K.B. 1702))

BLACKSTONE AND SUPREMACY

Sir William Blackstone's enunciation of the creed of supremacy of Parliament in 1765 had come too late to oust the philosophy of Sir Edward Coke in the "New World" (cf. Edward S. Corwin, The Higher Law Background of American Constitutional Law, Cornell 1955 pp.84-89). However, Blackstone's Commentaries on the Laws of England were not too late for South Africa. The philosophy of the supremacy of Parliament is contained in the following of Blackstone's dicta: "if the legislature positively enacts a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with the authority to control it"; (Parliament can) "do everything that is not naturally impossible"; and finally (Parliament's power) is "absolute and without control" (Blackstone, Vol. I, (4th edition 1876) pp. 66, 129. 130). Blackstone's statements seem to have replaced the vague "fundamental law" tradition as England's dominant legal philosophy (cf. J.W. Gough, Fundamental Law in English Constitutional History Oxford 1955 p. 202).

SUPREMACY AND SOUTH AFRICA

Needless to say, by the time of British occupation of the Cape in 1806 and the subsequent commencement of English legal influence on South African Law, the concept of parliamentary supremacy was unchallenged wherever the Union Jack flew. South African lawyers and politicians grew up, then, under a legal order antithetical to Coke's views. This may partially explain why there has been a lack of interest shown in an entrenched Bill of Rights coupled with judicial review in South Africa. If this opinion is regarded as far-fetched, it should be recalled that the other British colonies which progressed towards statehood during the nineteenth and early twentieth centuries, admittedly without any traumatic rupture with the "Motherland", were equally oblivious to the need for constitutional safeguards of individual liberty.

THE GOAL OF THIS ARTICLE

This article flows from a Constitutional Law lecture by Prof. S. Scott which was part of his series on "Manner and Form of Lawmaking and Parliamentary Sovereignty Doctrines". In the course of this particular lecture, Prof. Scott discussed, among others, two South African cases relating to provisions of the South Africa Act, 1909, viz. Ndlwana v. Hofmeyr N.O. ((1937) A.D. 229) and Harris v. Minister of the Interior ((1952) 2 S.A. 428 (A.D.)). The author was prompted to investigate at some further length the background to these cases and to explore the relation between the doctrine of the supremacy of Parliament and the development of the South African Constitution. This article attempts, briefly, to describe and explain the nature and problems of the unjust legal order in South Africa. It is hoped, perhaps naively, that the view aired here will stimulate "legal-notables" and constitutional law students to reflect on the nature of the legal system in South Africa and to call for reform.

THE COLONIES IN SOUTHERN AFRICA

There were four British Colonies in Southern Africa to be united: 1) the Orange Free State, which had a rigid American-type constitution with guaranteed rights -- although largely for whites; 2) the Transvaal State, which had a history of rejecting a rigid constitution in favour of the idol of "Volksraad" supremacy coupled with a firm adherence to the principle of racial inequality; 3) the Natal, which had the experience of British parliamentary institutions and racial superiority, with the Rule of Law confined largely to the white population; and 4) the Cape, which had a liberal tradition premised on a flexible constitution, the Rule of Law for all, and a colour-blind franchise.

DRAFTING THE CONSTITUTION

When the time for drafting the Constitution for the Union of South Africa came, the "British--Kruger" notion of Parliamentary supremacy prevailed -- subject, of course, to those powers reserved for the Imperial Parliament at Westminster. No attention was paid to the need for a Bill of Rights to protect the freedom of the vast non-franchised Africans from the whims of an all-white legislature. And federation, which might have resulted in a greater protection of individual liberty, was rejected in favour of a unitary form of government. This kind of constitution was the logical product of the prevailing legal and political climate in South Africa.

Many South Africans had come to believe that full independence could only be achieved under a flexible constitution following the British model and that any check on the legislature was a sign of political subordination (cf. Thompson, The Unification of South Africa 1902-1910 Oxford, 1960 p. 100). Furthermore, according to the men most responsible for drafting the constitution, viz. J.C. Smuts, then General Botha's second-in-command in the Transvaal, and John X. Merriman, Prime Minister of the Cape Colony, no other form of constitution was possible. Both were men steeped in English constitutional history.

According to Prof. Thompson, "Merriman had an almost romantic veneration for the British Constitution" (ibid. p. 95), and Smuts' bias toward British institutions, instilled in him by no less an authority than F.W. Maitland during his days as a law student at Cambridge University, had been confirmed by the Transvaal judicial crisis in which he had sided with President Kruger.

Of the the 34 delegates -- all white -- attending the National Convention which drafted the Constitution, 11 were lawyers, mostly trained in the Blackstone-Dicey tradition of parliamentary supre-

macy (ibid. pp. 174-75). None were prepared to press for a rigid constitution with a Bill of Rights. J.G. Kotzé, then Judge President of the Eastern Districts Court in Grahamstown, had publicly pleaded the cause of a rigid constitution before the Convention. But this was probably the kiss of death for such a scheme to many Transvaalers who had viewed Kotzé's stand against Kruger as an act of disloyalty.

THE FRANCHISE

Nonetheless, the Constitution that emerged from the deliberations was modelled on the Westminster pattern. It was not entirely free of rigid features. One of the most difficult questions to resolve was the franchise. While the delegates from the Cape favoured a colour-blind franchise, most delegates from the Transvaal, Orange Free State, and Natal favoured a Whites-only franchise. Significantly, the most racist in their approach to the black franchise were the delegates from Natal, whose Prime Minister, F.R. Moor, asserted that "the history of the world proved that the black man was incapable of Civilization." (Thompson, The Unification of South Africa, pp. 216, 218, 220, 223). The compromise finally reached allowed the Cape to retain its franchise qualifications, while northern provinces were permitted to exclude all blacks from participation in the electoral process.

THE 'ENTRENCHED' CLAUSES

This agreement was entrenched in Section 35 of the Constitution -- i.e. S. Africa Act, 1909--which provided that no person registered as a voter in the Cape, or capable of becoming a voter in the Cape in terms of the pre-Union requirements, could be deprived of his right to vote by reason of his race or colour only "unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses." Section 137 guaranteed the equal status of English and Afrikaans in the same way, and Section 152 provided that neither Section 35 nor Section 137 might be amended save by a two-thirds majority vote of members of both Houses of Parliament at a joint meeting. These three sections came to be known as the entrenched clauses and were later to be the subject of a bitter constitutional dispute.

The period between 1910 and 1961, when S. Africa became a republic, saw the expansion of the powers of Parliament and the demise of all legal curbs on Parliament's will. The advantages of a flexible constitution became clear to those bent on entrenching "afrikaner hegemony" by authoritarian means. "Civil liberty" and the "Rule of Law" were sacrificed on the altar of parliamentary supremacy to the idol of APARTHEID. Many British institutions and traditions were discarded by the National Party in the first decade of its rule after 1948, but the British tradition of legislative sovereignty was not one of these.

In 1931 the Statute of Westminster was passed. It repealed the Colonial Laws Validity Act and provided that, in future, no act of the British Parliament would extend to a Dominion without the consent of that Dominion. Thus South Africa became a sovereign independent state, free from any external control. In the same year doubts were expressed as to whether the entrenched clauses of the S. African Constitution would survive the passing of the Statute of Westminster, as in some quarters they were seen to be entirely dependent upon an Act of the Imperial Parliament.

THE TWO CASES

Political assurance was translated into political action in 1936 when the Representation of Natives Act (Act 12 of 1936), which removed African voters from the electoral roll in the Cape province and gave them separate representation was passed by the "unicameral" procedure laid down in the entrenched provisions. The Act was challenged by an African voter on the ground that this unicameral procedure was, since the passing of the Statute of Westminster, no longer lawful. The Appellate Division, in Ndlwana v. Hofmeyr N.O.(1937) held that "Parliament...can adopt any procedure it thinks fit; the procedure express or implied in the S. Africa Act so far as Courts of Law are concerned is at the mercy of Parliament like everything else... Parliaments will..as expressed in an Act of Parliament cannot now in this country, as it cannot in England, be questioned by a Court of Law, whose function it is to enforce that will not to question it." (Ibid., pp.237, 238) In the light of this decision it was generally accepted that the entrenched clauses had lost their legal efficacy and were at the mercy of the majority party in Parliament.

COLOURED VOTERS TO BE REMOVED

In 1948, Prime Minister Malan announced that the coloured voters in the Cape would be removed from the common electoral roll and be given separate representation in Parliament, as had happened to the Africans in 1936. This announcement was made soon after The National Party Government came to power. It was a time when this legislative alternative would be effected by a simple majority vote in both Houses of Parliament sitting separately. At this stage legal authority appeared to support the Government's position. (see Geoffrey Marshall, Parliamentary Sovereignty and the Commonwealth, Oxford, Clarendon Press; 1957 pp 139-248; also Hahlo and Kahn, South Africa: "The Development of its Laws and Constitution", pp. 151-63) Professor D.V. Cowen (in 1949) upset the applecart when he expounded the view that the entrenched provisions were unaffected by the Statute of Westminster. He contended that all hinged on the meaning to be given to the term "Parliament" in the South Africa Act. In his opinion, "Parliament" normally referred to the two Houses functioning separately, but, where the entrenched sections were at issue,"Parliament" consisted of the two Houses functioning together. (see D.V. Cowen; Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act, Cape Town, 1951.)

COURTS STAND UP TO GOVERNMENT

Undoubtedly the National Party Government was in no mood for legal niceties. It lacked the necessary political support for the unicameral procedure and was determined to remove the coloured voters from the mainstream of South African political life. In 1951 it introduced the Separate Representation of Voters Act, which, despite vigorous protests by the United Party Opposition, was piloted through both Houses of Parliament, sitting separately, and signed by the Governor-General. This enactment was challenged by a group of coloured voters in Harris v. Minister of the Interior -- the vote case -- in which the Appellate Division in a unanimous decision delivered by Chief Justice Centlivres found that the Act was of no legal force. It held that Ndlwana v. Hofmeyr had been wrongly decided; that the Statute of Westminster had been passed to remove the legislative supremacy of the British Parliament and not to modify the South Africa Constitution Act; that the unicameral procedure laid down in the entrenched sections was an essential feature of Parliament when matters affecting the coloured vote or the equal language rights came before Parliament; and that, by passing legislation dealing with matters falling within the purview of the entrenched sections by the ordinary "bicameral" procedure,

"Parliament" had not functioned as Parliament within the meaning of the South Africa Act.

HIGH COURT OF PARLIAMENT

Again by the ordinary bicameral method the Government's response was to pass the High Court of Parliament Act, which provided that any judgment of the Appellate Division invalidating an Act of Parliament was to be reviewed by Parliament itself sitting as a High Court of Parliament. After this High Court of Parliament was itself struck down by the Appellate Division in Minister of the Interior v. Harris (1952) (4) S.A. 769 (A.D.) -- the High Court of Parliament case. This time the five judges (Centlivres C.J., Greenberg, Schreiner, Van den Heever, and Hoexter, JJ.A.) gave separate judgments in which they all found that the High Court of Parliament was not a court, but simply Parliament in disguise and that the entrenched sections envisaged judicial protection by a proper Court of Laws. Legislation such as this, which deprived the entrenched sections of their judicial protection, could not be passed by the ordinary bicameral procedure. The story goes on.

THE MEANS TO THE END

The government, unable to muster the necessary support for a two-thirds majority at a joint meeting of both Houses, resorted to more ingenious, and devious, means of removing the coloured voters from the Cape roll: 1) it increased the size of the Appelate Division from five judges to eleven where the validity of an Act of Parliament was an issue by the Appellate Division Quorum Act, 1955, passed bicamerally (Act of 1955) 2) It passed the Senate Act, 1955, by bicameral method, which increased the size of the Senate from 48 to 89. The number of nominated Senators was increased from 8 to 16 and the method of election of other Senators was altered. Whereas before Senators had been elected in each province by electoral colleges consisting of members of Parliament and members of the Provincial Council by a system of proportional representation, they were now elected by a simple majority vote in the electoral colleges.

THE END ACHIEVED

As the National Party had a majority in the Cape, Transvaal, and Orange Free State, the result was that the Government was assured the support of the overwhelming majority of the new Senate. It now introduced the South Africa Act Amendment Act, 1956 (Act 9 of 1956) which was passed by a 2/3 majority of both houses sitting together. This Act revalidated the 1951 Separate Representation Voters' Act, removed section 35 from the scope of the entrenching procedure and provided that "(n)o Court of Law shall be competent to enquire into or to pronounce upon the validity of any law passed by Parliament other than a law which alters or repeals or purports to alter or repeal the provisions of section 137 or 152 of the South Africa Act, 1909."

SUMMARY

The author has paid special attention to the development of Parliamentary supremacy in South Africa as loyalty to this principle has, more than any other legal factor, brought about debasement of the South African legal system. In the U.K., parliamentary sovereignty is controlled by political tradition, convention, and the Rule of Law. In South Africa, few holds are barred as far as Parliament is concerned. Parliamentary Sovereignty has been taken to its logical and brutal conclusion at the expense of "Basic Human Rights". South Africa has achieved notoriety for its policy of apartheid or racial separation. Civil liberty has encountered numerous restrictions. These restrictions have been imposed in the furtherance of apartheid or in the maintenance of the existing segregated society. It is the policy of apartheid that has brought South Africa into international disrepute. The apartheid order is the legal order of South Africa. Fashioned by politicians, it has been applied by lawyers. No South African lawyer, to the author's mind, has escaped the contamination of this order, which has infected judges, magistrates, prosecutors, advocates, attorneys, and academics. This is not to suggest that lawyers, other than those lawyers in Parliament who conceived the laws, are to blame for the system or even that, as a body, they have collaborated with it.

Amen God!

BOARD OF STUDENT ADVISERS

Applications for the Board of Student Advisers, 1982-83, are now being accepted. Interested students should leave their résumé at S.A.O. and sign up for an interview (sign up sheet also at S.A.O.). Interviews will be conducted this week and next week.

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*** C O M I N G E V E N T S ***

Thursday, March 4

Faculty Council Meeting
Come watch the uproarious antics of this august body as it deliberates over the future of the National Program. 4:00 p.m. Room 202.

Friday, March 5

Skit Night
Malice in Wonderland. 8:00 p.m. Union Ballroom. Tickets on sale at the door. Limited seating.

Colloque Juridique
Droits et libertés de la personne. 1) La charte canadienne des droits: que faut-il en attendre? Walter Tarnapolsky et Claude Morin. Inscription: 12:30. Atelier: 14:00.

Saturday, March 6

Colloque Juridique
Droits et libertés de la personne. 2) L'activité policière 3) Le statut des réfugiés politiques au Canada. 4) Le droit du public à l'information. 5) Les programmes d'accès à l'égalité. Inscription: 8:00. $6 (Vendredi). Le dîner de samedi inclus. Faculté de Droit, Université de Montréal.

Colloque sur le Recours Collectif
1) La MIUF et la question de la représentativité du groupe 2) Du problème de mener à bien un recours collectif 3) Le Fonds d'aide aux recours collectifs 4) L'expérience Américaine 5) Les syndicats et le recours collectif 6) Le recours collectif et les droits fondamentaux. Inscription 8:30. $10. Moot Court McGill. Buffet inclus. Association de la femme et le droit de Montréal.